(10)

No. 04-712

Supreme Court, U.S.
FILED
JUL 19 2005
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

LINCOLN PROPERTY COMPANY AND
STATE OF WISCONSIN INVESTMENT BOARD,

Petitioners,

—v.—

CHRISTOPHE ROCHE AND JUANITA ROCHE,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENTS

GREGORY P. JOSEPH
Counsel of Record
SANDRA M. LIPSMAN
DOUGLAS J. PEPE
GREGORY P. JOSEPH LAW OFFICES LLC
805 Third Avenue, 31st Floor
New York, New York 10022
(212) 407-1200

Counsel for Respondents
Christophe and Juanita Roche

TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES	iii
INTRODUCTION	1
STATEMENT	3
SUMMARY OF ARGUMENT	13
ARGUMENT	18
I. THE FEDERAL COURTS ROUTINELY, AND NECESSARILY, EXAMINE THE CITIZENSHIP OF UNNAMED PARTIES IN DETERMINING DIVERSITY	18
A. The Forum Defendant Rule Does Not Define or Confer Diversity Jurisdiction	18
B. The Inquiry into Diversity of Citizenship Focuses on Real Parties to the Controversy, and Is Not Limited to "Parties . . . Joined and Served"	21
II. THE RULING BELOW WAS AN APPROPRIATE EXERCISE OF THE COURT'S AUTHORITY TO SAFEGUARD THE LIMITS OF ITS JURISDICTION	27

PAGE

III. THE DECISION BELOW IS CONSONANT WITH THE TEACHINGS OF THIS COURT AND THE FEDERAL RULES OF CIVIL PROCEDURE 31

A. The Fourth Circuit Decision Is Consistent with Policy that Plaintiff Is "Master of the Complaint" and May Select Defendants Tactically to Affect Diversity 31

B. The Ruling Below Did Not Implicate Rule 19, Much Less "Abrogate" It 35

C. The Ruling Below Does Not Create Uncertainty 37

IV. THE COURT OF APPEALS DID NOT DETERMINE THE CITIZENSHIP OF ANY LIMITED PARTNERSHIP, MUCH LESS APPLY A NEW "NEXUS" TEST 39

V. NO DUE PROCESS CONCERNS ARE IMPLICATED 41

CONCLUSION 42

APPENDIX OF STATUTES AND RULES INVOLVED 1a

TABLE OF AUTHORITIES

Cases: PAGE

Arkansas v. Texas, 346 U.S. 368 (1953) 23

Baer v. Chase, 392 F.3d 609 (3d Cir. 2004) 28 n.8

Bhalala & Shah, Inc. v. Quick Out Market, Inc., No. 131309, 1994 WL 1031171 (Va. Cir. Ct. May 2, 1994) 3 n.1

Carden v. Arkoma Assocs., 494 U.S. 185 (1990) .... *passim*

Caterpillar, Inc. v. Lewis, 519 U.S. 61 (1996) 33, 33-34, 34

Certain Interested Underwriters at Lloyd's v. Layne, 26 F.3d 39 (6th Cir. 1994) 39 n.10

Chemical Leaman Tank Lines, Inc. v. Aetna Cas. & Sur. Co., 177 F.3d 210 (3d Cir. 1999) 39 n.10

City of Chicago v. Int'l Coll. of Surgeons, 522 U.S. 156 (1997) 20, 32 n.9

Coal Co. v. Blatchford, 11 Wall. (78 U.S.) 172 (1871) 21

Cochran v. Montgomery County, 199 U.S. 260 (1905) 20 n.4

Colantuoni v. Alfred Calcagni & Sons, 44 F.3d 1 (1st Cir. 1994) 27-28 n.8

Corfield v. Dallas Glen Hills LP, 355 F.3d 853 (5th Cir. 2003), *cert. denied*, 541 U.S. 1073 (2004) 39 n.10

PAGE

Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579 (1993) 3, 8

Edelman v. Jordan, 415 U.S. 651 (1974) 24

E.R. Squibb & Sons v. Accident & Cas. Ins. Co., 160 F.3d 925 (2d Cir. 1998) 39 n.10

Exxon Mobil Corp. v. Allapattah Servs., Inc., ___ U.S. ___, 125 S. Ct. 2611 (2005) 20 n.5, 29

Franchise Tax Bd. v. Constr. Laborers Vacation Trust, 463 U.S. 1 (1983) 33

Gay v. Norfolk and Western Ry. Co., 253 Va. 212, 483 S.E.2d 216 (1997) 3 n.1

Goodman v. Hensley, 66 Va. Cir. 65 (2004) 3 n.2

Graham v. Am. Cyanamid Co., 350 F.3d 496 (6th Cir. 2003) 28 n.8

Great S. Fire Proof Hotel Co. v. James, 177 U.S. 449 (1900) 28

Grupo Dataflux v. Atlas Global Group, L.P., 541 U.S. 567 (2004) 34, 35, 38

Hernandez v. Trawler Miss Vertie Mae, Inc., 187 F.3d 432 (4th Cir. 1999) 27 n.8

Healy v. Ratta, 292 U.S. 263 (1934) 29

Homes Group, Inc. v. Vornado Air Circulation Sys., Inc., 535 U.S. 826 (2002) 32 n.9

Idaho v. Coeur d'Alene Tribe, 521 U.S. 261 (1997) 24

PAGE

Indiana Gas Co. v. Home Ins. Co., 141 F.3d 314 (7th Cir. 1998) 39 n.10

Indianapolis v. Chase Nat'l Bank, 314 U.S. 63 (1941) 26, 33

Ineichen v. Ameritech, 410 F.3d 956 (7th Cir. 2005) 28 n.8

In re Pennsylvania Co., 137 U.S. 451 (1890) 20 n.5

John v. Im, 263 Va. 315, 559 S.E.2d 694 (2002) 3 n.2

Kansas v. Colorado, 533 U.S. 1 (2001) 23

Kennedy v. Allied Mut. Ins. Co., 952 F.2d 262 (9th Cir. 1991) 28 n.8

Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375 (1994) 2, 16, 28

Kramer v. Caribbean Mills, Inc., 394 U.S. 823 (1969) 26

Lee v. Lehigh Valley Coal Co., 267 U.S. 542 (1925) 26 n.7

Lehigh Mining & Mfg. Co. v. Kelly, 160 U.S. 327 (1895) 2, 24-25

Louisville & Nashville R.R. Co. v. Mottley, 211 U.S. 149 (1908) 32 n.9

Lumbermen's Mut. Cas. Co. v. Elbert, 348 U.S. 48 (1954) 17, 22, 32

Marshall v. Baltimore & Ohio R.R. Co., 16 How. (57 U.S.) 314 (1854) 21

PAGE

McCormick v. City of Fort Lauderdale, 333 F.3d 1234 (11th Cir. 2003) 28 n.8

McNutt v. Bland, 2 How. (43 U.S.) 9 (1844)..... 21

McNutt v. Gen. Motors Acceptance Corp., 298 U.S. 178 (1936) 28-29

Miller & Lux, Inc. v. East Side Canal & Irrigation Co., 211 U.S. 293 (1908) 25

Minnesota v. Hitchcock, 185 U.S. 373 (1902) 24

Monahan v. OBICI Med. Mgmt. Servs., 59 Va. Cir. 307 (2002) 3 n.1

Murray v. Wilson Distilling Co., 213 U.S. 151 (1909)..... 24

Navarro Savs. Ass'n v. Lee, 446 U.S. 458 (1980).... *passim*

Newman-Green, Inc. v. Alfonzo-Larrain, 490 U.S. 826 (1989) 16, 33, 34

Provident Tradesmens Bank & Trust Co. v. Patterson, 390 U.S. 102 (1968) 32 n.9

Rice v Houston, 13 Wall. (80 U.S.) 66 (1871) 21

Rubens v. Mason, 387 F.3d 183 (2d Cir. 2004) 28 n.8

Shamrock Oil & Gas Corp. v. Sheets, 313 U.S. 100 (1941)..... 29

Simpson v. Providence Washington Ins. Group, 608 F.2d 1171 (9th Cir. 1979) 33 n.9

State Highway Comm'n v. Utah Constr. Co., 278 U.S. 194 (1929) 23

PAGE

Syngenta Crop Prot., Inc. v. Henson, 537 U.S. 28 (2002)..... 19-20

Walden v. Skinner, 101 U.S. 577 (1880) 33

Wecker v. National Enameling & Stamping Co., 204 U.S. 176 (1907) 26

Wood v. Davis, 18 How. (59 U.S.) 467 (1856)..... 33

Wormley v. Wormley, 8 Wheat. (21 U.S.) 421 (1823)..... 26 n.7

Statutes and Rules:

28 U.S.C. § 1332 (2005)..... *passim*

28 U.S.C. § 1359 (2005)..... 25, 26

28 U.S.C. § 1367 (2005)..... 20 n.5

28 U.S.C. § 1441 (2005)..... *passim*

28 U.S.C. § 1447 (2005)..... *passim*

Act of March 3, 1875, ch. 137, 18 Stat. 470..... 25

Act of March 3, 1911, ch. 231, § 24, 36 Stat. 1087, 1091 (codified as 28 U.S.C. § 41) 23

FED. R. CIV. P. 17..... 17, 22

FED. R. CIV. P. 19.....35, 36, 38

FED. R. CIV. P. 20..... 38

FED. R. CIV. P. 26..... 7

FED. R. CIV. P. 32..... 6, 7

FED. R. CIV. P. 54..... 8

PAGE

FED. R. EVID. 801 ..... 6, 7

Va. CODE ANN. § 8.01-420 (2005) 3 n.1

Va. SUP. CT. R. 3:18 ..... 3 n.1

Other Authorities:

1 VIRGINIA CIVIL BENCHBOOK § IX[B] (2004) 3 n.1

15 MOORE'S FEDERAL PRACTICE § 102.15 (3d ed. 2005) 22-23

Note, *Diversity Jurisdiction over Unincorporated Business Entities: The Real Party in Interest as a Jurisdictional* Rule, 56 TEX. L. REV. 243 (1978)..... 22 n.6

AMERICAN LAW INST., STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS (1969) 30

INTRODUCTION

May a non-public entity with an opaque web of affiliates use its organizational opacity as a device to manufacture diversity jurisdiction? The Fourth Circuit properly concluded that a party engaged in such jurisdictional gamesmanship failed to carry its burden of rebutting the presumption against federal jurisdiction.

Petitioners' Brief is predicated on a misconception of the Forum Defendant Rule, which is set forth in the last sentence of 28 U.S.C. § 1441(b). That sentence, by its terms, does not confer jurisdiction and is irrelevant. Yet, it lies at the heart of Petitioners' argument and the First Question that Petitioners have presented for review. Removal jurisdiction in this case was conferred not by § 1441(b) but rather by § 1441(a), which authorizes removal of "any civil action brought in a State court of which the district courts of the United States have original jurisdiction. . . ." Original jurisdiction, in turn, was prescribed by 28 U.S.C. § 1332(a)(1), which requires complete diversity of citizenship.

Only if there is complete diversity within § 1332(a)(1) (and, thus, § 1441(a)) does one reach the Forum Defendant Rule of § 1441(b). The Forum Defendant Rule does not confer jurisdiction but is an exception that bars removal by an otherwise diverse defendant who is a citizen of the forum state. This exception is premised on the antecedent existence of complete diversity, absent which removal is barred for lack of subject matter jurisdiction, rendering the Forum Defendant Rule, as here, irrelevant.

Properly conceived, the First Question presented for review entails two constituent questions. *First*: In evaluating whether a "matter in controversy . . . is between . . . citizens of different States," within

§ 1332(a)(1), must the court ever consider the citizenship of an unnamed real party to the controversy? The answer to this question is affirmative, as this Court has ruled many times, in many jurisdictional contexts.

Second: Was remand required because Petitioner Lincoln Property Co. ("Lincoln") did not carry its burden of rebutting the presumption against federal jurisdiction (*Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994)), such that, in the words of 28 U.S.C. § 1447(c), it "appear[ed] that the district court lack[ed] subject matter jurisdiction?" The Fourth Circuit reasonably concluded that remand was required where Lincoln had been obfuscatory as to the proper party defendant among a web of non-public affiliates.

The Second Question presented by Petitioners rests on a mischaracterization of the opinion of the Court of Appeals. The Fourth Circuit did not rule that a limited partnership's citizenship for diversity purposes is determined by its "very close nexus" with the state, but rather that the existence of this nexus was further evidence of Lincoln's obfuscation.

The decision below made no new, bold pronouncements of law. It recognized and applied this Court's teaching that the question of complete diversity will "generally be answered by application of the 'real party to the controversy' test." *Carden v. Arkoma Assocs.*, 494 U.S. 185, 188 n.1 (1990). It is consistent with this Court's disapproval of corporate use of affiliates as devices to manufacture federal jurisdiction. *See, e.g., Lehigh Mining & Mfg. Co. v. Kelly*, 160 U.S. 327 (1895). The decision should be affirmed.

STATEMENT

This is a state law controversy brought in the Virginia state court by two Virginia citizens against Lincoln, a non-public entity that held itself out as the manager of Respondents' residential apartment building in Virginia, and two additional defendants. Respondents Christophe and Juanita Roche chose to litigate in state court, and at no time eschewed a Virginia defendant in favor of a defendant whose citizenship was diverse. There were very practical reasons for the Roches' preference for a Virginia state court forum—reasons that had telling consequences below. Virginia practice does not permit summary judgment based on affidavits or deposition testimony,[1] and Virginia has not adopted the rule of *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993) to assess expert evidence.[2] The District Court ultimately excluded the testimony of the Roches' medical expert on *Daubert* grounds (Pet. App. 20-21a) and, requiring the submission of affidavits and deposition tes-

---

[1] *See* VA. CODE ANN. § 8.01-420 (2005); VA. SUP. CT. R. 3:18; *Gay v. Norfolk and Western Ry. Co.*, 253 Va. 212, 214, 483 S.E.2d 216, 218 (1997) ("Rule 3:18 and § 8.01-420 impose a very specific condition; namely, the parties must *agree* to the use of depositions before they may serve as a basis in whole, or in part, for the entry of summary judgment") (emphasis in original); *Monahan v. OBICI Med. Mgmt. Servs.*, 59 Va. Cir. 307, 313 (2002) ("Summary judgment can be entered based only on the plaintiff's pleadings and judicial admissions. . . . If discovery depositions play any role in the summary judgment analysis, it is as a weapon against the entry of summary judgment.") (citations omitted); *Bhalala & Shah, Inc. v. Quick Out Market, Inc.*, No. 131309, 1994 WL 1031171, at *2 (Va. Cir. Ct. May 2, 1994) ("An ex parte affidavit . . . may not form the basis for entry of a summary judgment."); 1 VIRGINIA CIVIL BENCHBOOK § IX[B] (2004).

[2] *John v. Im*, 263 Va. 315, 322, 559 S.E.2d 694, 697-98 (2002); *Goodman v. Hensley*, 66 Va. Cir. 65, 66 (2004).

timony (Pet. App. 26-27a), granted summary judgment because, *inter alia*, the Roches could not prove proximate causation once their expert testimony had been excluded. Pet. App. 30-31a, 34a.

As the Fourth Circuit found, Lincoln invoked the jurisdiction of the federal courts by obscuring the identity and citizenship of affiliates—operating under the "Lincoln" name—that were involved in managing the Roches' apartment complex. At no time prior to the denial of reconsideration in the Court of Appeals did Lincoln affirmatively identify the entity actually managing the apartment complex and, even then, it remained silent as to the corporate citizenship of one key affiliate—the corporate entity that signed the Roches' lease. The Court of Appeals appropriately held that such artful pleading and litigating, designed to shroud the identity of real parties to the controversy, was irreconcilable with Lincoln's burden of proving the existence of federal jurisdiction, and that the consequence of this lack of candor was appropriately borne by Petitioners as the parties seeking to divest the jurisdiction of the Virginia courts over this local dispute.

Actions Commenced. On August 26, 2002, the Roches each filed a Notice of Motion for Judgment and accompanying Motion for Judgment (the "State Court Complaints"), alleging state law tort, contract and other claims arising out of the presence of toxic mold in their apartment in the Westfield Village Apartments in Centerville, Virginia ("Westfield"). JA 25-50, 51-75. The Lincoln entity named in the State Court Complaints was "Lincoln Property Company t/a Lincoln Property Company ECW, Inc., Agent." JA 26, 52. Lincoln Property Company ECW, Inc. ("ECW I") is the signatory to the Roches' lease. JA 94. It is not the same corporation as Lincoln E.C.W. Property Management, Inc. ("ECW II"),

the entity belatedly identified by Lincoln as the limited partner in the limited partner of EQR/Lincoln Limited Partnership ("EQR"). The record is silent as to the corporate citizenship of ECW I or its role in the management or functioning of Westfield.

Removal and Consolidation. Petitioners' Notices of Removal dated September 17, 2002, list "Lincoln Property Co." in the caption without reference to ECW I (JA 76, 80), and identify Lincoln as a Texas corporation with its principal place of business in Texas (JA 77, 81). There is no mention in either Notice of Removal of ECW I or any other Lincoln affiliate.

The two actions filed by the Roches were consolidated into a single action in the District Court. JA 3. Petitioners filed motions to dismiss, which were granted with leave to replead. JA 4-5, 101-13. The Roches filed their Second Amended Complaint on December 16, 2002. JA 114-35.

Lincoln's Representations. In its answer to the Second Amended Complaint, Lincoln affirmatively represented that it was itself the manager of the Westfield property: "Lincoln admits that, by and through its regional offices located at 1155 Herndon Parkway, Suite 100, Herndon, Virginia, it has managed the Westfield Village Apartments since 1996." JA 137. Nowhere in its answer did Lincoln disclose that its "regional offices" were in fact separate, affiliated entities. Nor did Lincoln identify who those affiliates were.

In its answer, Lincoln also acknowledged that it held itself out to the public as the property manager of Westfield: "Lincoln admits that it advertised in newspapers and in realtor brochures that it was the property manager of Westfield Village Apartments. . . ." JA 137.

Discovery of Lincoln's Partnership Characteristics. The Roches accepted Lincoln's representations to the Court and did not challenge jurisdiction. But jurisdictional issues arose in the course of merits discovery. On February 13, 2003, the Roches deposed Lincoln officer Fred E. Chaney, the "property manager for Lincoln Property Company and Senior Vice President." JA 175. Mr. Chaney testified three times that Lincoln was, in fact, a partnership, not a corporation:

> Q. And do you sit on the board of Lincoln Property?
>
> A. We're a partnership. I am a partner in new deals. We don't have a board.
>
> Q. And this is a limited liability corporation or company?
>
> A. We have multiple structures that we operate under.
>
> ***
>
> Q. Now, Lincoln, as you say, is a partnership?
>
> A. Yes.
>
> ***
>
> Q. And it is not a publicly offered entity since it is a partnership. Am I correct?
>
> A. Correct.

JA 175-76. Because this is the testimony of a Senior Vice President of Lincoln, each of these statements is an admission of Lincoln, under FED. R. CIV. P. 32(a)(2) and FED. R. EVID. 801(d)(2)(A), (C) and (D).

Ensuing discovery continued to highlight the partnership character of Lincoln:

- Lincoln's supplemental FED. R. CIV. P. 26(a)(1) disclosures identified Jeff B. Franzen as a "Senior Vice President/Partner Lincoln Property Co." JA 180-81.
- Mr. Franzen executed an affirmation accompanying Lincoln's supplemental answers to interrogatories in which he swore that he was a "Senior Vice President/Partner for Defendant Lincoln Property Co." JA 179.
- At the deposition of John LeBeau, who is identified as a Vice President of Lincoln Property Co. in its supplemental Rule 26 disclosures (JA 181), Mr. LeBeau testified that Mr. Franzen was the "highest ranking officer" at Lincoln's Herndon, Virginia, office and that Mr. Franzen was a "Senior Vice President, Partner." Mr. LeBeau indicated that he did not "know what he [Mr. Franzen] is a partner of." JA 274.

These, too, are admissions of Lincoln, under FED. R. CIV. P. 32(a)(2) and FED. R. EVID. 801(d)(2)(A), (C) and (D).

Admission of Affiliate's Existence. For the first time on March 18, 2003, Lincoln admitted the existence of an affiliate that was a real party to the controversy. In responding to a letter from the Roches' counsel below requesting financial information from Lincoln for purposes of punitive damages discovery, and in a transparent effort to minimize the magnitude of the revenues and profits disclosed, Lincoln's counsel wrote:

> I am writing in response to your March 13, 2003 letter requesting information concerning Lincoln's financial statements. Lincoln is willing to enter into a stipulation regarding the following financial information concerning EQR/Lincoln Limited Partner-

ship, the entity that receives the management fees for Westfield Village Apartments . . .

JA 236 (emphasis added). Although EQR was identified as the recipient of management fees for Westfield, there was no disclosure as to which Lincoln entity (or entities) performed management services at Westfield.

Dispositive Motions. On April 4, 2003, the parties argued Petitioners' *Daubert* and summary judgment motions, and the Roches' summary judgment motion. *See* JA 10-12. On April 16, 2003, the District Court entered an Order notifying the parties that the Court had granted Petitioners' *Daubert* and summary judgment motions, and denied the Roches' motion. Pet. App. 20-21a. The April 16th Order specified that it was not a "judgment" within FED. R. CIV. P. 54(a), and that a Memorandum Order and Judgment would be forthcoming. *Id.* The Memorandum Order and Judgment were filed on July 25, 2003. Pet. App. 22-41a.

Remand Motion Practice. On April 22, 2003, the Roches' counsel below filed a Motion to Remand the action to the Virginia state court (JA 225-27) based on jurisdictional facts adduced during merits discovery and based on his additional investigation. In the course of litigating the remand motion, the Roches' counsel below proffered evidence that:

- No fewer than nine Lincoln entities were on file with the Virginia State Corporation Commission (Exhibit 17 to Plaintiffs' Motion to Remand dated April 22, 2003, E.D. Va. Docket No. 142), but neither "Lincoln Property Company" nor "Lincoln Property Co." was authorized to transact business in Virginia (JA 234-35);

- EQR, the entity identified in Lincoln counsel's March 18, 2003 letter, was a Delaware limited partnership that was authorized to do business in Virginia (Exhibit 3 to Plaintiffs' Motion to Remand dated April 22, 2003, E.D. Va. Docket No. 142);
- Lincoln's website identified Mr. Franzen—and seven other Lincoln Vice Presidents and Senior Vice Presidents—as "Operating Partners" (JA 277-82); and
- Tax records on file with the Fairfax County, Virginia, Department of Tax Administration reflected that Mr. Franzen was a Virginia resident (JA 232; Exhibit 14 to Plaintiffs' Motion to Remand dated April 22, 2003, E.D. Va. Docket No. 142).

The Roches' counsel below argued that Lincoln "intentionally represented that 'Lincoln Property Co.' was a Texas Corporation" while "[i]n fact, defendant Lincoln Property Co., is not a Texas Corporation, but a Partnership with one of its partners residing in the Commonwealth of Virginia." JA 226. He further argued that "there is a lack of subject matter jurisdiction because the numerous entities of Lincoln Property Co., including the one that is managing Westfield Village and accepting the management payments are not Texas Corporations. In actuality, it is a partnership conducting business in the Commonwealth of Virginia." JA 228-29.

Evidence adduced by the Roches' counsel below also established that Lincoln was in effect a nominal party—that, because Lincoln was not authorized to do business in Virginia (*see* JA 234-35), there must have been other "Lincoln" entities operating out of Lincoln's Herndon, Virginia, offices and managing Westfield.

In opposition to the Motion to Remand, Lincoln submitted two declarations. In the first, Dan M. Jacks, Lincoln's General Counsel, identified five pertinent Lincoln entities: Lincoln, EQR, Lincoln Eastern Management Corporation ("LEMC"), Lincoln Placeholder Limited Partnership ("Placeholder") and ECW II. JA 238-40. The relationship between EQR, LEMC, Placeholder and ECW II, as described in the Jacks Declaration and accompanying documents, is set forth in the chart reprinted at Pet. App. 96a (which is largely accurate but omits that LEMC is also a limited partner in EQR (JA 251-52)). Notably, however, the Jacks Declaration:

- Does not identify the Lincoln entity or entities actually charged with managing Westfield;
- Is silent as to the citizenship, activities, and existence of ECW I; and
- Sheds no light on the reasons why Lincoln affirmatively represented to the Court (in its answer) and the public that it was itself the manager of Westfield.

The second declaration filed by Lincoln was executed by Mr. Franzen. The Franzen Declaration makes no reference at all to Lincoln. Mr. Franzen identifies himself as "a Vice President for Lincoln Eastern Management Corporation," and states: "In addition, I am referred to as a 'Partner' because I am a partner in several Texas limited partnerships that are involved in the acquisition and development of properties." JA 275. None of these is identified. Mr. Franzen declares that he has never been a partner in EQR, and adds: "In addition, I am not a partner in any entity that is responsible for managing or that receives management fees for Westfield Village apartments." *Id.*

Like Mr. Jacks' declaration, Mr. Franzen's declaration (1) did not identify the entity or entities responsible for managing Westfield; (2) is silent as to the citizenship, activities and existence of ECW I; and (3) sheds no light on the reasons why Lincoln affirmatively represented to the Court and public that it was itself the manager of Westfield.

In opposing remand, Petitioners adduced no evidence that Lincoln itself was involved directly in any aspect of managing the Westfield property.

Following extensive briefing, the District Court denied the Roches' Motion to Remand in a Memorandum Order dated August 11, 2003. Pet. App. 84-93a.

Fourth Circuit Decision. Reviewing *de novo*, the Court of Appeals reversed the District Court's denial of the remand motion, holding that "Defendants failed to carry their burden of proof with respect to their allegedly diverse citizenship." Pet. App. 2a. The Fourth Circuit observed that "it is firmly settled that a corporate parent and its subsidiaries may not manipulate federal diversity jurisdiction by litigating cases in the name of the other where the real party in interest is not diverse." Pet. App. 5a (citations omitted). The Court of Appeals stressed that:

> The citizenship rule testing diversity in terms of the real party in interest is grounded in notions of federalism. It is based upon the principle that a primarily local controversy should be tried in the appropriate state forum and that nominal or formal parties, who do not have a significant interest in the outcome of the litigation, should not be able to use the federal courts.

Pet. App. 6a (citation omitted).

Noting that the District Court had erroneously reversed the burden of proof (Pet. App. 11a), the Fourth Circuit pointed out that Lincoln's 30(b)(6) witness (Senior Vice President Fred E. Chaney) described Lincoln as a partnership and that Lincoln executive John LeBeau described Franzen as a partner (*id.*). The Court of Appeals observed that only subsequently did Franzen "file a self-serving affidavit" claiming that he was a partner in other entities, none of which he identified. Pet. App. 11a. The Court of Appeals concluded that "the citizenship of the real parties in interest escapes us because of . . . mostly, Lincoln's failure to disclose all of the necessary jurisdictional facts. The negative inferences resulting from these obscurities . . . must be borne by Lincoln. . . ." Pet. App. 14a.

The jurisdictional issue was the subject of argument in the Fourth Circuit. Transcript of Oral Argument on May 5, 2005, at pp. 33-38, attached as Exhibit 2 to Lincoln's Reply in Support of its Motion for Relief from Mandate and, in the Alternative, to Present New Evidence, filed August 17, 2004, E.D. Va. Docket No. 192.[3] At argument, Lincoln's counsel represented that she was "very familiar with the record relating to Lincoln" and demonstrated that she was fully versed in the issue. *Id.* at 35-38. Following argument and before decision, Lincoln did not seek leave of court to submit any additional briefing or arguments concerning jurisdiction. Only after the Fourth Circuit decided against it did Lincoln seek to submit additional arguments on motions for rehearing and to stay issuance of the mandate pending their petition for certiorari. Appellees' Petition for Rehearing with Petition for Rehearing *En Banc*, filed July 14, 2004; Lincoln Property Co.'s and SWIB Investment Co.'s Motion to Stay Issuance of Mandate, filed July 30, 2004. These motions were denied. 4th Circuit Order on Petition for Rehearing and Rehearing *En Banc*, filed July 27, 2004; 4th Circuit Order filed August 4, 2004.

[3] As Petitioners' Brief accurately reflects (Pet. Br. 12 n.9), prior counsel to Respondents objected to Petitioners' inclusion in the Joint Appendix of this and other post-remand materials that were filed in the District Court. That objection is withdrawn.

On Remand in the District Court. Following remand to the District Court, Lincoln filed an Emergency Motion for Relief from Mandate and, in the Alternative, to Present New Evidence—effectively requesting that the District Court ignore the Fourth Circuit's mandate and decline to remand the case to the Virginia state court. Lincoln Property Co.'s Memorandum in Support of Emergency Motion for Relief from Mandate and, in the Alternative, to Present New Evidence, filed August 5, 2004, E.D. Va. Docket No. 186. In a tacit admission as to the inadequacy of the record at that point, Lincoln filed two additional factual declarations relating jurisdictional facts. *Id.* at Exhibits E and F. For the first time, in one of those declarations Lincoln asserted that: "No other entity affiliated with Lincoln (1) was involved in the management of Westfield Village or (2) received fees or revenue of any kind for the management of it." *Id.* at Exhibit E ¶ 8). Lincoln remained silent as to the citizenship, activities, and existence of ECW I, the signatory to the Roches' lease.

The District Court entered an order remanding the case to the Virginia state court (Minute Entry entered August 20, 2004, E.D. Va. Docket).

SUMMARY OF ARGUMENT

1. Petitioners' principal argument rests on a misreading of 28 U.S.C. § 1441(b). Petitioners urge that: "The Fourth Circuit's first holding [*i.e.*, its holding pertinent

to the First Question] conflicts with the plain language of the removal statute, which permits removal where each of the 'parties in interest *properly joined and served* as defendants' is diverse to each plaintiff. 28 U.S.C. § 1441(b)." Pet. Br. 1 (emphasis in original). Petitioners repeatedly quote this language from the last sentence of § 1441(b) (*e.g.*, Pet. Br. 7, 14, 15, 17, 23, 24), each time misconstruing it and misconceiving the statutory basis for removal jurisdiction in this diversity case.

The last sentence of § 1441(b) does not, by its terms, confer removal jurisdiction or have any relevance to this case. It simply states the Forum Defendant Rule, which prohibits an otherwise diverse defendant who is a citizen of the forum state from removing the action to federal court. Neither the Fourth Circuit nor the Roches suggested that a diverse local defendant had attempted removal in violation of the Forum Defendant Rule. Rather, the Fourth Circuit ruled, and the Roches contended, that there was no subject matter jurisdiction because diversity of citizenship had not been established by Petitioners. The question, properly conceived, arises under 28 U.S.C. § 1332(a)(1), not § 1441(b).

In a diversity action such as this, removal jurisdiction is conferred not by § 1441(b), but rather by § 1441(a). Section 1441(a) authorizes removal of "any civil action brought in a State court of which the district courts of the United States have original jurisdiction. . . ." By its reference to "original jurisdiction," § 1441(a) incorporates, for present purposes, the complete diversity and amount in controversy requirements of § 1332(a)(1). Complete diversity was found wanting. The Forum Defendant Rule, an exception to removal which assumes the antecedent existence of complete diversity within § 1332(a)(1) (and, thus, § 1441(a)), is beside the point.

---

2. Accordingly, the First Question presented for review entails two subsidiary questions, the first arising under § 1332 and the second under the removal statutes, particularly § 1447(c). The § 1332 question is: In evaluating whether a "matter in controversy . . . is between . . . citizens of different States," within § 1332(a)(1), must the court ever consider the citizenship of an unnamed real party to the controversy? This Court has answered this question in the affirmative many times, in many contexts. For example, an action against a state official or state entity is evaluated to determine if it is, in reality, an action against the state. Similarly, formal and nominal parties are disregarded and the citizenship of real parties to the controversy is assessed to determine if diversity exists. The same sort of "real party to the controversy" analysis is applied in several other jurisdictional contexts, as well.

Moreover, this Court has expressed specific concern that artificial entities not be permitted to use affiliates to manufacture otherwise non-existent diversity. The Fourth Circuit recognized that, by artful pleading and litigating, a non-public entity with a web of non-public affiliates, is uniquely situated to use the opacity of its organizational structure to manufacture the appearance of diversity by thrusting itself forward as the real party to the controversy, to the exclusion of undisclosed, non-diverse affiliates. When such an entity is not candid with the Court or counsel as to its direct involvement in the activities at issue, it has the power to trump the preference of a plaintiff for a state court venue—including, as here, a state court venue with potentially outcome-determinative differences in procedure and evidence.

The Court of Appeals refused to sanction disingenuous conduct by such a non-public entity—conduct that was designed to create diversity jurisdiction and is akin

to such pernicious, and disfavored, practices as fraudulent joinder to defeat jurisdiction, collusive joinder to create jurisdiction, and misalignment of parties to simulate jurisdiction. Where such a non-public entity does not clarify which of its affiliates are real parties to the controversy, despite ample opportunity to do so, it has not carried its burden of rebutting the presumption against federal jurisdiction, as the Fourth Circuit found. Placing a burden of candor on the non-public entity is scarcely a high price to pay for the right to invoke federal jurisdiction. "[I]t has never been the rule that federal courts, whose jurisdiction is created and limited by statute, acquire power by adverse possession." *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 839 (1989) (Kennedy, J., dissenting) (citation omitted).

3. The removal question before the Court is: Was remand required because Lincoln failed to carry its burden of rebutting the presumption against federal jurisdiction, *Kokkonen*, 511 U.S. at 377, such that, in the words of 28 U.S.C. § 1447(c), it "appear[ed] that the district court lack[ed] subject matter jurisdiction?" The Fourth Circuit concluded that remand was required where Petitioners had not resolved doubts concerning the nature of Lincoln and obscured proper parties defendant among Lincoln's network of non-public affiliates. The Court of Appeals did not, and it did not condone any attempt by the Roches to, "cast about for other potential defendants under the guise of identifying a jurisdictional flaw." Pet. Br. 15. Senior executives of Lincoln, in sworn testimony, and Lincoln itself in a variety of discovery documents, indicated that Lincoln was itself a partnership, not a corporation. Lincoln filed affidavits to take issue with its executives' testimony. The Court of Appeals did not credit the affidavits, and it found that they raised more questions than they answered. This conclusion that Lincoln failed to carry its burden of

proving that it is a foreign corporation is an independent ground for affirming.

Further, Lincoln itself belatedly identified one affiliate that was a proper party defendant when, in order to avoid disclosing Lincoln's own financial information, it offered that of an affiliated partnership (EQR) to satisfy a demand for punitive damages discovery. Even then, however, Lincoln failed to identify the party that managed the property at issue, and it never cured this omission until after the Fourth Circuit denied rehearing. Nor did Lincoln ever identify the citizenship, or describe the activities, of its affiliate ECW I, which signed the Roches' lease.

4. Petitioners seize on the Fourth Circuit's occasional use of the phrase "real party in interest" to argue that FED. R. CIV. P. 17 limits the analysis to the question whether plaintiffs, not defendants, are "real parties to the controversy" (*Carden*, 494 U.S. at 188 n.1). That argument is irreconcilable with *Navarro Savs. Ass'n v. Lee*, 446 U.S. 458, 463 n.9 (1980), *Lumbermen's Mut. Cas. Co. v. Elbert*, 348 U.S. 48, 51 (1954), numerous other decisions, and several established doctrines (*e.g.*, fraudulent joinder to defeat jurisdiction and disregarding formal or nominal parties). The decision below is consistent with the notion that the plaintiff is "master of the complaint" and may tactically select parties to affect jurisdiction. The Fourth Circuit's holding is animated by these policies, empowering plaintiffs to make informed choices by precluding non-public entities like Lincoln from engaging in dissimulation with respect to affiliates relevant to the plaintiff's forum decision.

5. The ruling below does not open the floodgates to post-judgment litigation any more than a defendant's concealment of material evidence does; both open the door to a post-judgment motion for relief, and both are

rare. The class of cases to which the Court of Appeals' ruling applies is small—it applies to non-public entities which have non-public affiliates and which are not candid as to their role, and that of their affiliates, in the transaction or occurrence at issue, in order to invoke and preserve a federal forum. The message is straightforward: Mischief breeds consequences.

ARGUMENT

I. THE FEDERAL COURTS ROUTINELY, AND NECESSARILY, EXAMINE THE CITIZENSHIP OF UNNAMED PARTIES IN DETERMINING DIVERSITY

Contrary to Petitioners' argument (Pet. Br. 12), governing statutes and this Court's precedents "sanction" what Petitioners characterize as "the court of appeals' wide-ranging *sua sponte* inquiry into the citizenship of entities not named in the plaintiff's complaint in determining whether diversity jurisdiction exists." *See* Pet. Br. 12. The propriety of removal in this case depended on whether there existed diversity of citizenship as defined in 28 U.S.C. § 1332, an inquiry that is nowhere restricted to entities "properly joined and served as defendants," in the words of § 1441(b).

A. The Forum Defendant Rule Does Not Define or Confer Diversity Jurisdiction

Petitioners argue that "[t]he court had no statutory basis for examining the citizenship of entities that had *not* been 'properly joined and served as defendants' in deciding whether removal under § 1441(b) was proper." Pet. Br. 17. This argument rests on Petitioners' misconstruction of the Forum Defendant Rule, from which Petitioners quote an excerpt. The Forum Defendant Rule,

however, provides only that, where diversity otherwise exists—*i.e.*, in "a civil action of which the district courts have original jurisdiction"—a defendant may not remove if it has been sued in its home forum:

> Any other such action [*i.e.*, any action other than one based on federal question jurisdiction] shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

28 U.S.C. § 1441(b). This sentence is, by its terms, a limitation on the right to remove where federal jurisdiction exists. It quite clearly does not confer jurisdiction. Petitioners' repeated quotation of the phrase "parties in interest properly joined and served as defendants" thus may be forensically skilled but it misses the jurisdictional point.

Removal jurisdiction is conferred in diversity actions not by § 1441(b) but rather by § 1441(a), which provides in pertinent part:

> Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court <u>of which the district courts of the United States have original jurisdiction</u>, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

28 U.S.C. § 1441(a) (emphasis added).

"Original jurisdiction," within § 1441(a), is conferred in a diversity action by 28 U.S.C. § 1332(a)—in this case, by § 1332(a)(1), which confers "original jurisdiction of all civil actions where the matter in controversy . . . is between—(1) citizens of different States. . . ." *See, e.g., Syngenta Crop Prot., Inc. v. Henson*, 537

U.S. 28, 34 (2002) ("Section 1441 requires that a federal court have original jurisdiction over an action in order for it to be removed from a state court"); *City of Chicago v. Int'l Coll. of Surgeons*, 522 U.S. 156, 163 (1997) ("The propriety of removal . . . depends on whether the case originally could have been filed in federal court."). Section 1441 does not expand the scope of diversity jurisdiction. On the contrary, this Court has consistently ruled that removal is confined to cases in which diversity of citizenship is complete[4] and the requisite amount in controversy is satisfied.[5]

Accordingly, the jurisdictional issue is not whether the ken of the courts below was restricted to "parties in interest properly joined and served as defendants" within the last sentence of § 1441(b). It was not. Section 1441(b) is irrelevant; § 1332(a)(1) is governing. The jurisdictional issue is: In evaluating whether a "matter in controversy . . . is between . . . citizens of different States," within § 1332(a)(1), must the court ever consider the citizenship of an unnamed real party to the controversy? The answer to this question is Yes.

---

[4] *Cochran v. Montgomery County*, 199 U.S. 260, 272 (1905) (construing a predecessor to § 1441 which authorized removal by a non-resident defendant on grounds of "prejudice and local influence." Held, "the class of cases removable on the ground of prejudice and local influence is confined to those in which there is a controversy between a citizen or citizens of the State in which the suit is pending and a citizen or citizens of another or other States. . . .").

[5] *In re Pennsylvania Co.*, 137 U.S. 451, 451-57 (1890) (construing a predecessor to § 1441 which authorized removal by a non-resident defendant on grounds of "prejudice and local influence." Held, "[t]he matter in dispute must exceed the sum or value of two thousand dollars in order to give the Circuit Court jurisdiction, as well in cases sought to be removed from a state court on account of prejudice or local influence. . . ."). The instant action does not implicate 28 U.S.C. § 1367 or the holding of this Court in *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, ___ U.S. ___, 125 S. Ct. 2611 (2005).

B. The Inquiry into Diversity of Citizenship Focuses on Real Parties to the Controversy, and Is Not Limited to "Parties . . . Joined and Served"

In determining federal jurisdiction, this Court has consistently (1) applied the "real party to the controversy" test to both plaintiffs and defendants, and (2) rejected any suggestion that the courts are constrained in their review by the identity of the parties enumerated in the complaint. Indeed, § 1332 expressly contemplates that diversity may be destroyed by reference to the citizenship of unnamed parties. For example, § 1332(c)(1) provides that an insurer/defendant in a direct action is deemed to have the citizenship of its unnamed insured, and § 1332(c)(2) provides that the legal representative of an estate is deemed to have the citizenship of the decedent.

"Early in its history, this Court established that the 'citizens' upon whose diversity a plaintiff grounds jurisdiction must be real and substantial parties to the controversy. . . ." *Navarro*, 446 U.S. at 460-61, *citing McNutt v. Bland*, 2 How. (43 U.S.) 9, 15 (1844); *Marshall v. Baltimore & Ohio R.R. Co.*, 16 How. (57 U.S.) 314, 328-29 (1854); *Coal Co. v. Blatchford*, 11 Wall. (78 U.S.) 172, 177 (1871).

Consequently, "in controversies between citizens of different States, it is the character of the real and not that of the nominal parties to the record which determines the question of jurisdiction. . . ." *Rice v Houston*, 13 Wall. (80 U.S.) 66 (1871). *Cf. Carden*, 494 U.S. at 188 n.1 ("The question . . . which of various parties before the Court should be considered for purposes of determining whether there is complete diversity of citizenship, [is] a question that will generally be answered by application of the 'real party to the controversy' test.").

In the decision below, the Court of Appeals interchangeably used the phrases "real and substantial parties to the controversy" (Pet. App. 4a), "real parties to the controversy" (Pet. App. 4a, 14a n.12), "real and substantial party in interest" (Pet. App. 5a, 6a, 7a n.5, 15a, 16a), and "real party in interest" (Pet. App. 5a, 6a & n.4, 9a, 10a, 14a & nn.12-13, 16a), often in close proximity to one another. Petitioners seize on the phrase "real party in interest" to argue that FED. R. CIV. P. 17 limits any proper "real party in interest" analysis to real parties plaintiff, not (as here) defendants. Pet. Br. 25-26. This is incorrect.

> There is a 'rough symmetry' between the 'real party in interest' standard of Rule 17(a) and the rule that diversity jurisdiction depends upon the citizenship of real parties to the controversy. But the two rules serve different purposes and need not produce identical outcomes in all cases.

Navarro, 446 U.S. at 463 n.9 (1980) (citations omitted).[6] *See also Lumbermen's Mut. Cas. Co.*, 348 U.S. 48, a direct action against an insurer that was decided after the adoption of FED. R. CIV. P. 17 and before enactment of § 1332(c)(1). A Louisiana statute authorized a direct action against the insurer alone, and the plaintiff made the strategic choice to pursue the action against the insurer only. This Court ruled that the insurer was "not merely a nominal defendant but is the real party in interest here." *Id.* at 51. *Accord* 15 MOORE'S FEDERAL

[6] As observed in a law review note cited by *Navarro* for this proposition, the "real party in interest" analysis applies to defendants as well as plaintiffs: "If a court finds that a party *contesting* a suit is merely a nominal party, then it looks to a more appropriate party for diversity purposes." Note, *Diversity Jurisdiction over Unincorporated Business Entities: The Real Party in Interest as a Jurisdictional Rule*, 56 TEX. L. REV. 243, 250 (1978) (emphasis added).

PRACTICE § 102.15 at 102-27 (3d ed. 2005) ("A-real-party-in-interest defendant is one who, according to applicable substantive law, has the duty sought to be enforced or enjoined.").

Petitioners' argument that the real-party-in-interest "analysis does not assess the citizenship of putative defendants not named in the complaint" (Pet. Br. 25-26) is irreconcilable with, among others, this Court's decision in *State Highway Comm'n v. Utah Constr. Co.*, 278 U.S. 194 (1929). The plaintiff construction company in *State Highway Comm'n* sued the Wyoming State Highway Commission for breach of contract. This Court found that the "real party in interest" defendant was the unnamed State of Wyoming, which was not a citizen. As a consequence, the Court held that "the petition showed no diversity of citizenship between real parties in interest," under the then-operative diversity statute, 28 U.S.C. § 41. *Id.* at 199-200.

The Court examines the interest of unnamed "real parties to the controversy" to decide many jurisdictional issues. For example, exercise of the Court's original jurisdiction over controversies between two States often requires consideration of whether the real party to the controversy is the state or its unnamed citizenry. *See, e.g., Arkansas v. Texas*, 346 U.S. 368, 371 (1953) ("We determine whether in substance the claim is that of the State, whether the State is indeed the real party in interest."); *Kansas v. Colorado*, 533 U.S. 1, 7-9 (2001) ("We have several times held that a State may not invoke our original jurisdiction when it is merely acting as an agent or trustee for one or more of its citizens.").

In cases implicating the Eleventh Amendment, the Court looks beyond the named defendant to determine whether "the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from

suit even though individual officials are nominal defendants." *Edelman v. Jordan*, 415 U.S. 651, 663 (1974). *See also, e.g., Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 277-78 (1997) ("It is not 'conclusive of the principal question in this case, that the [State] is not named as a party defendant. Whether it is the actual party . . . must be determined by a consideration of the nature of the case as presented on the whole record.'"); *Murray v. Wilson Distilling Co.*, 213 U.S. 151, 167-69 (1909) ("Though not nominally a party to the record, it [the State] is the real and only party in interest, . . . the real party to the controversy, [and] the real party against which relief is sought by the suit. . . .").

Similarly, in interpreting the scope of the judicial power conferred by Article III, Section 2, this Court has looked beyond the named defendant to determine whether the United States is the real party to the controversy. *Minnesota v. Hitchcock*, 185 U.S. 373, 387 (1902) ("The question whether the United States is a party to a controversy is not determined by the merely nominal party on the record but by the question of the effect of the judgment or decree which can be entered.").

As these examples suggest, the answer to the First Question presented—"Whether an entity not named or joined as a defendant in the lawsuit can nonetheless be deemed a 'real party in interest' to destroy complete diversity of citizenship in a case removed from state court under 28 U.S.C. § 1441(b)"—is affirmative.

Moreover, the inquiry made by the Fourth Circuit is consistent with this Court's disapproval of the manipulation of corporate affiliates to manufacture diversity and is analogous to many other juridical doctrines adopted by this Court to enforce the limited scope of federal diversity jurisdiction. In *Lehigh Mining & Mfg. Co.*, 160 U.S. 327, the shareholders of a Virginia corporation set up a Pennsylvania corporation (with identical share ownership) for the sole purpose of assigning to it title to property so that the Pennsylvania corporation could commence a federal action relating to the property. *Id.* at 330-31. This was deemed collusive and barred under the predecessor statute to 28 U.S.C. § 1359 (Act of March 3, 1875, ch. 137, 18 Stat. 470): "[W]hen the inquiry involves the jurisdiction of a Federal court,—the presumption in every stage of a cause being that it is without the jurisdiction of a court of the United States, unless the contrary appears from the record. . . ." 160 U.S. at 336-37 (citations omitted). *See also Miller & Lux, Inc. v. East Side Canal & Irrigation Co.*, 211 U.S. 293, 302-03 (1908) (holding that a parent company cannot create federal diversity by assigning its claim to a subsidiary, again under the Act of March 3, 1875).

The Fourth Circuit was similarly concerned with the collusive manufacture of federal jurisdiction—not through the creation of a corporate affiliate but through the concealment of a non-diverse affiliate's (or affiliates') existence. Lincoln knew that the Roches preferred a state court venue—the action had been commenced there. Lincoln represented in its answer that it was itself the manager of the Westfield property, but it never offered any evidence that it in fact had anything to do with the management of Westfield. Lincoln represented in its answer that it conducted its management of Westfield through its "regional offices"—but it carefully omitted that these "offices" comprised one or more distinct entities. Lincoln was in fact a nominal party—but it had the virtue of being diverse and being the party that held itself out to the public as the manager of Westfield. Lincoln's artful pleading and litigating were designed to create and preserve federal jurisdiction by diverting attention concerning corporate citizenship to itself, rather than affiliated entities actually acting in Virginia.

This behavior was properly proscribed. It is the cognate of equally pernicious, and prohibited, practices such as:

- Fraudulent joinder to defeat jurisdiction. *Wecker v. National Enameling & Stamping Co.*, 204 U.S. 176, 185-86 (1907):

  > [T]he Federal courts should not sanction devices intended to prevent a removal to a Federal court where one has that right, and should be equally vigilant to protect the right to proceed in the Federal court as to permit the state courts, in proper cases, to retain their own jurisdiction.[7]

- Improper or collusive joinder to create jurisdiction. 28 U.S.C. § 1359; *Kramer v. Caribbean Mills, Inc.*, 394 U.S. 823, 829 (1969) ("Such 'manufacture of Federal jurisdiction' was the very thing which Congress intended to prevent when it enacted § 1359 and its predecessors.").

- Misalignment of parties to create federal jurisdiction. *Indianapolis v. Chase Nat'l Bank*, 314 U.S. 63, 69 (1941) (citation omitted):

  > Diversity jurisdiction cannot be conferred upon the federal courts by the parties' own determination of who are plaintiffs and who defendants. It is our duty, as it is that of the lower federal courts, to "look beyond the pleadings and arrange the parties according to their sides in the dispute."

[7] *Accord Wormley v. Wormley*, 8 Wheat. (21 U.S.) 421, 451 (1823) (Story, J.); *Lee v. Lehigh Valley Coal Co.*, 267 U.S. 542, 543 (1925) (Holmes, J.).

In this case, the Fourth Circuit recognized that, in dealing with a non-public entity that operates a web of affiliates under a common name, a "real party to the controversy" may be an affiliate that is hidden from view in order to manufacture federal jurisdiction. The Fourth Circuit recognized that it is no great burden to require such a non-public entity, when invoking federal jurisdiction, to disclose its relevant affiliates and to refrain from disingenuous conduct designed to obfuscate their existence. The Court of Appeals reasonably concluded that a party engaged in jurisdictional gamesmanship of this sort failed to carry its burden of rebutting the presumption against federal jurisdiction.

II. THE RULING BELOW WAS AN APPROPRIATE EXERCISE OF THE COURT'S AUTHORITY TO SAFEGUARD THE LIMITS OF ITS JURISDICTION

Petitioners begin their argument by assuming the conclusion: "The statutory requisites were readily satisfied . . . Lincoln was a Texas corporation with its principal place of business in Dallas. . . . " Pet. Br. 14. Senior executives of Lincoln, in sworn testimony, and Lincoln itself in a variety of discovery documents, indicated quite the contrary—that Lincoln was in fact a partnership. *See* pp. 6-8, *supra*. Lincoln filed what the Fourth Circuit aptly characterized in one instance (Pet. App. 11a) as a "self-serving" affidavit to take issue with its executives' testimony. The Court of Appeals did not credit the affidavits, consistent with the practice in the Fourth and other Circuits rejecting a party's contradiction of his or her prior testimony without adequate explanation—a circumstance that arises with some frequency in the summary judgment context.[8] The Fourth

[8] *See, e.g., Hernandez v. Trawler Miss Vertie Mae, Inc.*, 187 F.3d 432, 438 (4th Cir. 1999); *Colantuoni v. Alfred Calcagni & Sons,*

Circuit's conclusion that Lincoln did not carry its burden of proof that it was a foreign corporation is an independent ground for affirming the decision below.

The Fourth Circuit did not, and it did not condone any attempt by the Roches to, "cast about for other potential defendants in the guise of identifying a jurisdictional flaw," as Petitioners suggest. Pet. Br. 15. The flaw was raised by the testimony of senior officers of Lincoln and by Lincoln itself in discovery responses, including its identification of EQR as the entity whose financials were germane for purposes of punitive damages discovery. The Court of Appeals was bound to resolve the jurisdictional question. *Carden*, 494 U.S. at 195 ("Since diversity of citizenship is always a jurisdictional requirement, the Court is always 'called upon to decide' it.") (quoting *Great S. Fire Proof Hotel Co. v. James*, 177 U.S. 449, 453 (1900)).

Nor was it improper for the Court of Appeals to place the burden of establishing jurisdiction on Petitioners, as the parties who invoked it:

> Federal courts are courts of limited jurisdiction. They possess only that power authorized by Constitution and statute, which is not to be expanded by judicial decree. It is to be presumed that a cause lies outside this limited jurisdiction, and the burden of establishing the contrary rests upon the party asserting jurisdiction.

Kokkonen, 511 U.S. at 377 (citations omitted). *Accord McNutt v. Gen. Motors Acceptance Corp.*, 298 U.S. 178

---

44 F.3d 1, 5 (1st Cir. 1994); *Rubens v. Mason*, 387 F.3d 183, 192 (2d Cir. 2004); *Baer v. Chase*, 392 F.3d 609, 624 (3d Cir. 2004); *Graham v. Am. Cyanamid Co.*, 350 F.3d 496, 509 (6th Cir. 2003); *Ineichen v. Ameritech*, 410 F.3d 956, 963 (7th Cir. 2005); *Kennedy v. Allied Mut. Ins. Co.*, 952 F.2d 262, 266 (9th Cir. 1991); *McCormick v. City of Fort Lauderdale*, 333 F.3d 1234, 1240 (11th Cir. 2003).

(1936). "Due regard for the rightful independence of state governments, which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which the statute has defined." *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 109 (1941) (quoting *Healy v. Ratta*, 292 U.S. 263, 270 (1934)).

Petitioners' suggestion that the Court of Appeals' examination of the citizenship of unnamed parties was an unwarranted frolic seriously mischaracterizes the record and the nature of the Court's obligation in the face of it. Lincoln, a non-public company, occupies an undefined place in an amorphous network of undisclosed affiliates, through which it concededly transacts business. On the basis of Lincoln's representations to the public, the Roches named what they thought was the Lincoln entity operating out of Virginia and managing their Virginia apartment. Lincoln so affirmed in its answer. The sworn testimony and discovery responses of Lincoln and its officers did not quell but rather fueled wholly reasonable concern that either Lincoln or an affiliated "real party to the controversy" was non-diverse. That undercut any need or justification for a federal forum:

> [T]he purpose of the diversity requirement . . . is to provide a federal forum for important disputes where state courts might favor, or be perceived as favoring, home-state litigants. The presence of parties from the same State on both sides of a case dispels this concern, eliminating a principal reason for conferring § 1332 jurisdiction over any of the claims in the action.

Exxon Mobil Corp., 125 S. Ct. at 2618 (citations omitted). There was no error in the Fourth Circuit's resolution of that issue.

The American Law Institute, in its STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS (1969), articulated the federalism concerns that properly guide judicial resolution of diversity jurisdiction issues like this one:

> [A]ccess to the federal courts because of the diversity of citizenship of the parties should be permitted only upon a showing of strong reasons therefor and only to the extent that these reasons justify. This premise is grounded upon the political axiom, advanced by Hamilton in justification of the federal judicial power, that judicial and legislative authority should be coextensive. So long as federal courts continue to decide cases arising under state law without the possibility of state review, the state's judicial power is less extensive than its legislative power; this is an undesirable interference with state autonomy. *** The diversion of state law litigation to federal tribunals that is fostered by the availability of diversity jurisdiction retards the formation and development of state law; to the extent that unsettled questions of state law are thus kept away from the state courts—and that can be, and at times has been, substantial and important—authoritative resolution of these questions is at least delayed and at times precluded.

Id. at 99. The decision of the Fourth Circuit reflects an appropriate balancing of these concerns when a court is confronted with a non-public entity that maintains a private network of affiliates and seeks to use its organizational opacity as a device to manufacture diversity jurisdiction over a local controversy. Candor to the tribunal is not too weighty a burden to impose on such an entity when it is invoking federal jurisdiction.

III. THE DECISION BELOW IS CONSONANT WITH THE TEACHINGS OF THIS COURT AND THE FEDERAL RULES OF CIVIL PROCEDURE

A. The Fourth Circuit Decision Is Consistent with Policy that Plaintiff Is "Master of the Complaint" and May Select Defendants Tactically to Affect Diversity

There is no merit to Petitioners' argument that the ruling below is dissonant with either (1) the policy that the plaintiff is "master of the complaint," or (2) a plaintiff's privilege to voluntarily dismiss a non-diverse party in order to preserve diversity jurisdiction. *See, e.g.*, Pet. Br. 17 ("The choice of respondents, as masters of their complaint, not to sue any non-diverse defendants is dispositive."); Pet. Br. 21 ("[A] plaintiff can dismiss voluntarily a non-diverse party to create diversity. If a plaintiff has license to create diversity jurisdiction in that manner, then it makes no sense to defeat a defendant's removal based on an entity the plaintiff has not sued."). The Fourth Circuit's holding in fact animates these policies by empowering plaintiffs to make informed choices and by precluding non-public entities like Lincoln from engaging in obfuscation with respect to affiliates relevant to the plaintiff's forum decision. Petitioners' argument appears to be that these policies, granting plaintiff the power to name or omit defendants, concomitantly grant named defendants the power to determine jurisdiction by hiding proper parties defendant and thus effectively dictating plaintiffs' choices. This argument has several flaws.

First, Petitioners' "master of the complaint" argument is founded on the false premise that plaintiffs are in an informed position and thus able to effectuate their preferences. In this case, the opacity of Lincoln's business

structure, combined with Lincoln's lack of candor in its answer, its inconsistent discovery responses, and its insistence on playing it close to the vest when called upon to clarify jurisdictional facts, thwarted any informed, let alone tactical, decision to name or omit any Lincoln affiliate. The Roches wanted to be in Virginia state court. They thought they were suing the Lincoln entity operating out of Virginia and managing their Virginia apartment. They directed service to Lincoln t/a (trading as) ECW I. They effected service through a Virginia registered agent at a Virginia address. The authorities cited by Petitioners for their "master of the complaint" argument involve conscious choices made by plaintiffs informed by knowledge of the jurisdictional facts—and are inapposite due to Lincoln's conduct below.

In *Lumbermen's Mut. Cas. Co.*, 348 U.S. 48, for example, the plaintiff had taken advantage of Louisiana's direct action statute, which created a separate cause of action against the insurer, with elements and defenses different from those assertable in an action against the insured party. The plaintiff was given the statutory choice of suing the insurer in lieu of, or in addition to, the insured. All potential defendants and their citizenships were known, and plaintiffs made a strategic choice to sue one and not another. There is no suggestion that, as here, the existence or identity of any potential defendant was difficult to ascertain, let alone, as here, deliberately obscured.[9]

[9] *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102 (1968), involved an insurance company that had, for various tactical reasons, declined to name its insured. *Homes Group, Inc. v. Vornado Air Circulation Sys., Inc.*, 535 U.S. 826 (2002), *Louisville & Nashville R.R. Co. v. Mottley*, 211 U.S. 149 (1908), and *City of Chicago v. Int'l College of Surgeons*, 522 U.S. 156 (1997), all address (in some cases only elliptically) a plaintiff's decision to include or characterize allegations in a way that will or will not state a federal question. *Simpson v. Providence Washington Ins. Group*, 608 F.2d 1171 (9th Cir. 1979), undermines Petitioners' argument in a way that is particularly apt. In *Simpson*, an employment discrimination case, the defendant effected removal after informing plaintiff that a foreign parent, rather than its non-diverse subsidiary, was actually plaintiff's employer. After the plaintiff obtained dismissal of affirmative defenses in federal court, the defendant sought to challenge diversity after purportedly discovering that a second non-diverse subsidiary was plaintiff's employer. The court refused to allow the defendant to take advantage of its ability to control jurisdictional information.

Second, as reflected in the discussion in Part I(B), *supra*, there have always existed numerous exceptions to the "master of the complaint" rubric when diversity jurisdiction is at issue. Thus, this Court realigns parties according to their interests in the dispute, regardless of how the plaintiff labels them. *Indianapolis v. Chase Nat'l Bank*, 314 U.S. at 69. The Court disregards formal or nominal parties. *Wood v. Davis*, 18 How. (59 U.S.) 467, 469-70 (1856); *Walden v. Skinner*, 101 U.S. 577, 588-89 (1880). Similarly, in federal question cases, the Court applies the artful pleading exception to the well-pleaded complaint rule. *Franchise Tax Bd. v. Constr. Laborers Vacation Trust*, 463 U.S. 1, 22 (1983) ("it is an independent corollary of the well-pleaded complaint rule that a plaintiff may not defeat removal by omitting to plead necessary federal questions in a complaint"). Fairly considered, the Fourth Circuit applied the equivalent of an artful pleading and artful litigating exception, framed in terms of Petitioners' failure to carry their burden of proof.

Third, the Fourth Circuit's decision is consistent with the teachings of *Caterpillar, Inc. v. Lewis*, 519 U.S. 61 (1996), and *Newman-Green*, 490 U.S. 826. *Caterpillar* concerned a technical removal flaw; the jurisdictional spoiler had been removed by the time of trial and judg-

ment. In the instant case, the Fourth Circuit held that no jurisdiction ever vested in the federal courts because defendants failed to carry their burden of proving diversity. One may agree or disagree with the Fourth Circuit's conclusion, but in no respect does this case concern a technical removal flaw that was cured by the time of judgment. Petitioners rely on the statement in *Caterpillar* that, "[o]nce a diversity case has been tried in federal court . . . considerations of finality, efficiency, and economy become overwhelming." 519 U.S. at 75 (quoted at Pet. Br. 21). However, as this Court emphasized in *Grupo Dataflux v. Atlas Global Group, L.P.*, 541 U.S. 567, 574 (2004), this statement "related not to cure of the jurisdictional defect, but to cure of a statutory defect, namely failure to comply with the requirement of the removal statute, 28 U.S.C. § 1441(a), that there be complete diversity at the time of removal." As in *Grupo Dataflux*, the jurisdictional defect in the instant case was not cured by the time of judgment, rendering *Caterpillar* inapt.

Newman-Green, which was decided on summary judgment, ruled that in certain circumstances the Courts of Appeals, like District Courts, have the authority to dismiss a dispensable nondiverse party to eliminate a jurisdictional defect. 490 U.S. at 837. That the courts have such powers does not address whether a non-public entity like Lincoln may invoke the jurisdiction of the federal courts by cloaking in secrecy the activities of affiliated entities to prevent the plaintiffs from naming a non-diverse defendant. Moreover, *Newman-Green* observed that the controversy before it would, if dismissed, be re-filed in federal court after dismissal and "proceed to a preordained judgment." 490 U.S. at 837. This case will proceed in state court, if the Fourth Circuit decision is affirmed, and stark differences in summary judgment practice and the law of expert evidence

will certainly not lead to a pre-ordained judgment, whatever the outcome. Even if this were not the case, however, the absence of jurisdiction should lead to remand. As it did in *Grupo Dataflux*, 541 U.S. at 597, this Court should reject the argument that jurisdiction be upheld despite a jurisdictional flaw because dismissal would lead to re-litigation and a waste judicial and legal resources. If the parties choose to continue to litigate rather than to settle, "the 'waste' will not be great. Having been through three years [here, one year] of discovery and pretrial motions in the current case, the parties would most likely proceed promptly to trial." *Id.* at 581.

B. The Ruling Below Did Not Implicate Rule 19, Much Less "Abrogate" It

Petitioners argue that the ruling below was "tantamount" to "a ruling that EQR was an indispensable party, without whose presence the case could not proceed," and that such "Rule 19 analysis should be completely unnecessary to a proper decision whether removal is appropriate. . . ." Pet. Br. 28, 30. In fact, the Court of Appeals was explicit that it was unable to identify the real parties to the controversy. "From the record, it appears that the real and substantial party in interest is the Virginia subsidiary, *be it a partnership, corporation or otherwise*, rather than the Texas parent." Pet. App. 16a (emphasis added). The Court concluded that the record created by Petitioners was too confused and incomplete to dispel the appearance that the district court lacks subject matter jurisdiction, the condition under which dismissal is mandated by 28 U.S.C. § 1447(c).

Petitioners focus on, and in brackets add to, the following sentence from the opinion below: "To be accu-

rate, both the Texas parent and the Virginia sub-'partnership' should be parties to the instant action." Pet. App. 16a. Petitioners choose EQR from among multiple entities examined by the Court of Appeals as the entity to interlineate following the word "sub-'partnership' " in the bracketed "[*i.e.*, EQR]." Pet. Br. 28. Petitioners could as easily have inserted the name "Lincoln Property Company ECW, Inc." (ECW I) to which they devote a footnote conceding that "Lincoln Property Company ECW, Inc." was both the signatory to the lease and a nominal defendant until Lincoln chose to answer on behalf of itself rather than that entity. Pet. Br. 33 n.27. Lincoln carefully omitted all mention of ECW I from its answer, its Notices of Removal, and from every declaration it filed on the Motion to Remand, although the brief of amicus Real Estate Roundtable ("RER") suggests that ECW I is likely to be a Virginia special purpose entity dedicated to the Westfield property at issue: "The parent entity is likely to setup a separate business entity—for example, a partnership or limited liability company—for each of the individual properties." *Id.* at 8. No such entity, be it ECW I or otherwise, was ever identified. The principal place of business of this entity is likely to be Virginia.

Rule 19 analysis played no part, explicitly or implicitly, in the Court of Appeals' conclusion that Petitioners had supplied insufficient jurisdictional facts to support federal jurisdiction. The jurisdictional question before the Court is antecedent to any Rule 19 issue. Unless jurisdiction exists, the Federal Rules of Civil Procedure are not implicated.

C. The Ruling Below Does Not Create Uncertainty

Petitioners argue that:

> The Fourth Circuit's rule imposes a burden on a defendant to prove a negative—that there is no other possible non-named defendant who might have an interest in the lawsuit and that, if there are, those non-named putative defendants also are completely diverse from the plaintiffs. Such open-ended and standardless requirements should not be engrafted onto removal determinations, which occur thousands of times a year in the federal courts.

Pet. Br. 37-38.

There are at least four flaws in this argument.

First, the class of cases to which the Court of Appeals' ruling applies is small—it applies to non-public entities which have non-public affiliates and which are not candid as to their role, and that of their affiliates, in the transaction or occurrence at issue, in order to invoke and preserve a federal forum.

Second, the "real party to the controversy" test is already engrained in federal jurisprudence. A defendant already must prove that it is not a formal or nominal party, that it is properly before the Court. The defendant need not prove a negative—it must prove a positive: That it belongs before the Court. That is an element of proof that Lincoln never satisfied as to itself, and which it declined to clarify as to its affiliates until after the case was remanded by the Fourth Circuit to the District Court. Further, the removing defendant must disclose affiliates involved in the transaction or occurrence at issue.

Third, the burden of demonstrating that a non-public entity's pertinent affiliates are diverse is no heavier than the burden routinely imposed by *Carden* on limited partnerships—entities that can be quite complex and far-flung (indeed, publicly traded). The burdensome aspect of Lincoln's participation in motion practice below did not arise from any inherent difficulty in determining the existence of Virginia affiliates or their interest in this litigation, but rather arose out of Lincoln's artfully avoiding disclosure of non-public information solely within its control that may have destroyed, or permitted the plaintiff to destroy, diversity.

Fourth, any ensuing inquiry will not be "standardless." Determinations of citizenship are based on bright lines, as this Court recently reiterated in *Grupo Dataflux*, 541 U.S. at 582, and none of those bright lines is called into question here. The citizenship and activities of Lincoln's affiliates involved in the transactions and occurrences set forth in the Roches' Second Amended Complaint are objective facts. If the jurisdictional issue concerns whether there is an unnamed, non-diverse, real party to the controversy, and, unlike here, the court is in fact able to identify that party, then 28 U.S.C. § 1447(e), and FED. R. CIV. P. 19 and 20, supply standards. Indeed, it is not an unfair reading of the Court of Appeals' decision that the Court effectively did a § 1447(e) analysis, but was prevented from joining the additional, unidentifiable Lincoln affiliate due to Lincoln's jurisdictional gamesmanship and effectively reached the same result.

Petitioners' hyperbole aside, this issue will not arise "thousands of times a year," but only in the rare case, where, as here, the court is presented with evidence—in this case from the defendant itself—calling subject matter jurisdiction into question. When that occurs, proceedings to resolve that issue are essential, and will not

clog the federal courts, as Petitioners predict, but rather will have the salutary effect of limiting the reach of federal courts in areas where federal questions are not implicated.[10]

IV. THE COURT OF APPEALS DID NOT DETERMINE THE CITIZENSHIP OF ANY LIMITED PARTNERSHIP, MUCH LESS APPLY A NEW "NEXUS" TEST

The Second Question presented by Petitioners rests on their mischaracterization of the opinion below. The Fourth Circuit did not rule that a limited partnership's

---

[10] We would be remiss were we not to point out that the conflict among the Circuits identified by the Petitioners is largely a conflict concerning the proper method for determining the citizenship of Lloyd's of London, and the resolution of this case is unlikely to resolve that conflict, which turns on the unique structure of Lloyd's (is the citizenship of a syndicate dispositive?) and the contractual relations among the various "Names" and underwriters (does it matter whether a lead underwriter sues or is sued in a representative capacity or in its own name?). *Compare Indiana Gas Co. v. Home Ins. Co.*, 141 F.3d 314, 317-19 (7th Cir. 1998) (citizenship of syndicates essential; to be determined by citizenship of each Name); *Certain Interested Underwriters at Lloyd's v. Layne*, 26 F.3d 39, 43 (6th Cir. 1994) (citizenship of syndicates and Names irrelevant; active underwriters may be sued as agents for undisclosed principals); *E.R. Squibb & Sons v. Accident & Cas. Ins. Co.*, 160 F.3d 925, 939-40 (2d Cir. 1998) (agreeing with Seventh Circuit that, if lead underwriter sues or is sued in a representative capacity, citizenship of all Names must be considered, but also holding that, if only one Name sues or is sued, the citizenship of other Names may be disregarded, even if all are contractually bound by the result); *Corfield v. Dallas Glen Hills LP*, 355 F.3d 853, 864-66 (5th Cir. 2003), *cert. denied*, 541 U.S. 1073 (2004) (following *Squibb*); *Chemical Leaman Tank Lines, Inc. v. Aetna Cas. & Sur. Co.*, 177 F.3d 210, 221-23 (3d Cir. 1999) (action against underwriter in both representative and individual capacity deemed to be in reality against the underwriter only, given the absence of class certification, such that only the underwriter's citizenship must be considered).

citizenship for diversity purposes is determined by its "very close nexus" with the state, but rather that the existence of this nexus was further evidence of Lincoln's obfuscation.

Petitioners argue that "limited partnership EQR's 'nexus' of activities to Virginia is irrelevant to determining its citizenship for diversity jurisdiction." Pet. Br. 41. The Court of Appeals never ruled on the citizenship of EQR or any other limited partnership. Describing "ample record evidence" of the connection to Virginia—including, *inter alia*, "the property at issue . . . the mold abatement services . . . several rental properties [maintained by Lincoln, and] . . . correspondence and communication related to the controversy"—the Court concluded that "[a]ll of this militates in favor of finding that the real and substantial party in interest is the Lincoln entity (partnership or not); probably EQR/Lincoln Limited Partnership, which 'is an authorized and registered partnership in Virginia.' " Pet. App. 15a. For its statement that EQR was a "registered partnership *in Virginia*" (*id.*; emphasis in original), the Court cited certificates in the record from the Virginia State Corporation Commission. On the following page of its opinion (Pet. App. 16a), again reviewing indications that some unidentified Virginia entity was the real party to the controversy, the Court subsumed all those indicia under a comment on "a very close nexus with the Commonwealth."

None of the foregoing constituted (1) a determination—even a statement—that EQR was a citizen of Virginia; (2) a determination of the citizenship of any limited partnership, or (3) reliance upon a "nexus" test to determine the citizenship of any entity whatsoever.

The Second Question presented by Petitioners is not fairly raised by the Fourth Circuit's opinion and is not in dispute.

V. NO DUE PROCESS CONCERNS ARE IMPLICATED

In their post-remand submissions to the District Court, Petitioners asserted that they intended to seek certiorari on the following question: "First, whether a court of appeals may decide dispositive issues raised *sua sponte*, without giving the parties either notice or an opportunity to be heard." (Lincoln Property Co.'s Motion to Stay Issuance of Mandate, filed July 30, 2004 at p. 2). Tellingly, that had been an issue raised by Petitioners in their Petition for Rehearing with Petition for Rehearing *En Banc*. (Appellees' Petition for Rehearing with Petition for Rehearing *En Banc* filed July 14, 2004, at pp. 12-14). It was not, however, an issue on which Petitioners sought certiorari or on which certiorari was granted. It is not properly before the Court.

In all events, Lincoln was fully accorded due process—it received ample notice and several opportunities to be heard. The diversity jurisdiction issue was extensively briefed in the District Court. JA 13-15. It was argued in the Court of Appeals by counsel for Lincoln who represented to that Court that she was "very familiar" with the issue, and who then proceeded to demonstrate that by arguing the issue thoroughly. Transcript of Oral Argument on May 5, 2005, at pp. 35-38, attached as Exhibit 2 to Lincoln's Reply in Support of its Motion for Relief from Mandate and, in the Alternative, to Present New Evidence, E.D. Va. Docket No. 192. Lincoln did not seek leave of court to submit additional briefing or argument on the issue after argument in the Fourth Circuit. Lincoln did submit additional briefing on its Peti-

tion for Rehearing with Petition for Rehearing *En Banc*. Appellees' Petition for Rehearing with Petition for Rehearing *En Banc*, filed July 14, 2004. There was no failure of due process, as a matter of fact.

CONCLUSION

The judgment of the Fourth Circuit should be affirmed.

Respectfully submitted,

GREGORY P. JOSEPH
Counsel of Record
SANDRA M. LIPSMAN
DOUGLAS J. PEPE
GREGORY P. JOSEPH LAW OFFICES LLC
805 Third Avenue, 31st Floor
New York, New York 10022
(212) 407-1200

Counsel for Christophe and Juanita Roche

TABLE OF CONTENTS FOR APPENDIX

PAGE

28 U.S.C. § 1359 (2005) 1a

Act of March 3, 1875, ch. 137, 18 Stat. 470 ..... 2a

Act of March 3, 1911, ch. 231, § 24, 36 Stat. 1087, 1091 (codified as 28 U.S.C. § 41) 10a

FED. R. CIV. P. 20(a) 12a

FED. R. CIV. P. 32(a)(2) 13a

FED. R. EVID. 801(d)(2) 14a

VA. CODE ANN. § 8.01-420 (2005) 15a

VA. SUP. CT. R. 3:18 ..... 16a

28 U.S.C.A. § 1359 (2005) – Parties Collusively Joined or Made

A district court shall not have jurisdiction of a civil action in which any party, by assignment or otherwise, has been improperly or collusively made or joined to invoke the jurisdiction of such court.

Act of March 3, 1875, ch. 137, 18 Stat. 470 – An Act to Determine the Jurisdiction of Circuit Courts of the United States, and to Regulate The Removal of Causes From State Courts, and For Other Purposes

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the circuit courts of the United States shall have original cognizance, concurrent with the courts of the several States, of all suits of a civil nature at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, or in which the United States are plaintiffs or petitioners, or in which there shall be a controversy between citizens of different States or a controversy between citizens of the same State claiming lands under grants of different States, or a controversy between citizens of a State and foreign states, citizens, or subjects; and shall have exclusive cognizance of all crimes and offenses cognizable under the authority of the United States, except as otherwise provided by law, and concurrent jurisdiction with the district courts of the crimes and offenses cognizable therein. But no person shall be arrested in one district for trial in another in any civil action before a circuit or district court. And no civil suit shall be brought before either of said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving such process or commencing such proceeding, except as hereinafter provided; nor shall any circuit or district court have cognizance of any suit founded on contract in favor of an assignee unless a

suit might have been prosecuted in such court to recover thereon if no assignment had been made, except in cases of promissory notes negotiable by the law merchant and bills of exchange. And the circuit courts shall also have appellate jurisdiction from the district courts under the regulations and restrictions prescribed by law.

SEC. 2. That any suit of a civil nature, at law or in equity, now pending or hereafter brought in any State court where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, or in which the United States shall be plaintiff or petitioner, or in which there shall be a controversy between citizens of different States, or a controversy between citizens of the same State claiming lands under grants of different States, or a controversy between citizens of a State and foreign States, citizens, or subjects, either party may remove said suit into the circuit court of the United States for the proper district. And when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different States, and which can be fully determined as between them, then either one or more of the plaintiffs or defendants actually interested in such controversy may remove said suit into the circuit court of the United States for the proper district.

SEC. 3. That whenever either party, or any one or more of the plaintiffs or defendants entitled to remove any suit mentioned in the next preceding section shall desire to remove such suit from a State court to the circuit court of the United States, he or they may make and file a petition in such suit in such State court before or at the term at which said cause could be first tried and

before the trial thereof for the removal of such suit into the circuit court to be held in the district where such suit is pending, and shall make and file therewith a bond, with good and sufficient surety, for his or their entering in such circuit court, on the first day of its then next session, a copy of the record in such suit, and for paying all costs that may be awarded by the said circuit court, if said court shall hold that such suit was wrongfully or improperly removed thereto, and also for there appearing and entering special bail in such suit, if special bail was originally requisite therein, it shall then be the duty of the State court to accept said petition and bond, and proceed no further in such suit, and any bail that may have been originally taken shall be discharged; and the said copy being entered as aforesaid in said circuit court of the United States, the cause shall then proceed in the same manner as if it had been originally commenced in the said circuit court; and if in any action commenced in a State court the title of land be concerned, and the parties are citizens of the same State, and the matter in dispute exceed the sum or value of five hundred dollars, exclusive of costs, the sum or value being made to appear, one or more of the plaintiffs or defendants, before the trial, may state to the court, and make affidavit, if the court require it, that he or they claim and shall rely upon a right or title to the land under a grant from a State, and produce the original grant, or an exemplification of it, except where the loss of public records shall put it out of his or their power, and shall move that any one or more of the adverse party inform the court whether he or they claim a right or title to the land under a grant from some other State, the party or parties so required shall give such information, or otherwise not be allowed to plead such grant, or give it in evidence upon the trial; and if he or they inform that he or they do

claim under such grant, any one or more of the party moving for such information may then, on petition and bond as hereinbefore mentioned in this act, remove the cause for trial to the circuit court of the United States next to be holden in such district; and any one of either party removing the cause shall not be allowed to plead or give evidence of any other title than that by him or them stated as aforesaid as the ground of his or their claim, and the trial of issues of fact in the circuit courts shall, in all suits except those of equity and of admiralty and maritime jurisdiction, be by jury.

SEC. 4. That when any suit shall be removed from a State court to a circuit court of the United States, any attachment or sequestration of the goods or estate of the defendant had in such suit in the State court shall hold the goods or estate so attached or sequestered to answer the final judgment or decree in the same manner as by law they would have been held to answer final judgment or decree had it been rendered by the court in which such suit was commenced; and all bonds, undertakings, or security given by either party in such suit prior to its removal shall remain valid and effectual, notwithstanding said removal; and all injunctions, orders, and other proceedings had in such suit prior to its removal shall remain in full force and effect until dissolved or modified by the court to which such suit shall be removed.

SEC. 5. That if, in any suit commenced in a circuit court or removed from a State court to a circuit court of the United States, it shall appear to the satisfaction of said circuit court, at any time after such suit has been brought or removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said circuit court, or that the parties to said suit have been improperly or col-

lusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable under this act, the said circuit court shall proceed no further therein, but shall dismiss the suit or remand it to the court from which it was removed as justice may require, and shall make such order as to costs as shall be just; but the order of said circuit court dismissing or remanding said cause to the State court shall be reviewable by the Supreme Court on writ of error or appeal, as the case may be.

SEC. 6. That the circuit court of the United States shall, in all suits removed under the provisions of this act, proceed therein as if the suit had been originally commenced in said circuit court, and the same proceedings had been taken in such suit in said circuit court as shall have been had therein in said State court prior to its removal.

SEC. 7. That in all causes removable under this act, if the term of the circuit court to which the same is removable, then next to be holden, shall commence within twenty days after filing the petition and bond in the State court for its removal, then he or they who apply to remove the same shall have twenty days from such application to file said copy of record in said circuit court, and enter appearance therein; and if done within said twenty days, such filing and appearance shall be taken to satisfy the said bond in that behalf; that if the clerk of the State court in which any such cause shall be pending, shall refuse to any one or more of the parties or persons applying to remove the same, a copy of the record therein, after tender of legal fees for such copy, said clerk so offending shall be deemed guilty of a misdemeanor, and, on conviction thereof in the circuit court of the United States to which said action or proceeding

was removed, shall be punished by imprisonment not more than one year, or by fine not exceeding one thousand dollars, or both in the discretion of the court.

And the circuit court to which any cause; shall be removable under this act shall have power to issue a writ of certiorari to said State court commanding said State court to make return of the record in any such cause removed as aforesaid, or in which any one or more of the plaintiffs or defendants have complied with the provisions of this act for the removal of the same, and enforce said writ according to law; and if it shall be impossible for the parties or persons removing any cause under this act, or complying with the provisions for the removal thereof, to obtain such copy, for the reason that the clerk of said State court refuses to furnish a copy, on payment of legal fees, or for any other reason, the circuit court shall make an order requiring the prosecutor in any such action or proceeding to enforce forfeiture or recover penalty as aforesaid, to file a copy of the paper or proceeding by which the same was commenced, within such time as the court may determine; and in default thereof the court shall dismiss the said action or proceeding; but if said order shall be complied with, then said circuit-court shall require the other party to plead, and said action, or proceeding shall proceed to final judgment; and the said circuit court may make an order requiring the parties thereto to plead de novo; and the bond given, conditioned as aforesaid, shall be discharged so far as it requires copy of the record to be filed as aforesaid.

SEC. 8. That when in any suit, commenced in any circuit court of the United States, to enforce any legal or equitable lien upon, or claim to, or to remove any incumbrance or lien or cloud upon the title to real or personal property within the district where such suit is brought, one or more of the defendants therein shall not

be an inhabitant of, or found within, the said district, or shall not voluntarily appear thereto, it shall be lawful for the court to make an order directing such absent defendant or defendants to appear, plead, answer, or demur, by a day certain to be designated, which order shall be served on such absent defendant or defendants, if practicable, wherever found, and also upon the person or persons in possession or charge of said property, if any there be; or where such personal service upon such absent defendant or defendants is not practicable, such order shall be published in such manner as the court may direct, not less than once a week for six consecutive weeks; and in case such absent defendant shall not appear, plead, answer, or demur within the time so limited, or within some further time, to be allowed by the court, in its discretion, and upon proof of the service or publication of said order, and of the performance of the directions contained in the same, it shall be lawful for the court to entertain jurisdiction, and proceed to the hearing and adjudication of such suit in the same manner as if such absent defendant had been served with process within the said district; but said adjudication shall, as regards said absent defendant or defendants without appearance, affect only the property which shall have been the subject of the suit and under the jurisdiction of the court therein, within such district. And when a part of the said real or personal property against which such proceeding shall be taken shall be within another district, but within the same State, said suit may be brought in either district in said State; *Provided, however*, That any defendant or defendants not actually personally notified as above provided may, at any time within one year after final judgment in any suit mentioned in this section, enter his appearance in said suit in said circuit court, and thereupon the said court shall make an order

setting aside the Judgment therein, and permitting said defendant or defendants to plead therein on payment by him or them of such costs as the court shall deem just; and thereupon said suit shall be proceeded with to final judgment according to law.

SEC. 9. That whenever either party to a final judgment or decree which has been or shall be rendered in any circuit court has died or shall die before the time allowed for taking an appeal or bringing a writ of error has expired, it shall not be necessary to revive the suit by any formal proceedings aforesaid. The representative of such deceased party may file in the office of the clerk of such circuit court a duly certified copy of his appointment and thereupon may enter an appeal or bring writ of error as the party he represents might have done. If the party in whose favor such judgment or decree is rendered has died before appeal taken or writ of error brought, notice to his representatives shall be given from the Supreme court, as provided in case of the death of a party after appeal taken or writ of error brought.

SEC. 10. That all acts and parts of acts in conflict with the provisions of this act are hereby repealed.

Approved, March 3, 1875.

Act of March 3, 1911, ch. 231, § 24, 36 Stat. 1087, 1091 (codified as 28 U.S.C. § 41)

Original Jurisdiction

The district courts shall have original jurisdiction as follows:

(1) United States as plaintiff; civil suits at common law or in equity.

First. Of all suits of a civil nature at common law or in equity, brought by the United States, or by any officer thereof authorized by law to sue, or between citizens of the same State claiming lands under grants from different State; or, where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of $3,000. and (a) arises under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority. or (b) Is between citizens of a State and foreign States, citizens or subjects. No district court shall have cognizance of any suit (except upon foreign bills of exchange) to recover upon any promissory note or other chose in action in favor of any assignee, or of any subsequent holder if such instrument be payable to bearer and be not made by any corporation, unless such suit might have been prosecuted in such court to recover upon said note or other chose in action if no assignment had been made. The foregoing provision as to the sum or value of the matter in controversy shall not be construed to apply to any of the case mentioned in the succeeding paragraphs of this section. Notwithstanding the foregoing provisions of this paragraph, no district court shall have jurisdiction of any suit to enjoin, suspend, or restrain the enforcement, operation, or execution of any order of an administrative

board or commission of a State, or any rate-making body of a political subdivision thereof, or to enjoin, suspend, or restrain any action in compliance with any such order, where jurisdiction is based solely upon the ground of diversity of citizenship, or the repugnance of such order to the Constitution of the United States, where such order (1) affects rates chargeable by a public utility, (2) does not interfere with interstate commerce, and (3) has been made after reasonable notice and hearing, and where a plain, speedy and efficient remedy may be had at law or in equity in the courts of such State. Notwithstanding the foregoing provisions of this paragraph, no district court shall have jurisdiction of any suit to enjoin, suspend, or restrain the assessment, levy or collection of any tax imposed by or pursuant to the laws of any State where a plain, speedy, and efficient remedy may be had at law or in equity in the courts of such State.

***

***

Federal Rule of Civil Procedure 20 – Permissive Joinder of Parties

(a) Permissive Joinder. All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all these persons will arise in the action. All persons (and any vessel, cargo or other property subject to admiralty process in rem) may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all defendants will arise in the action. A plaintiff or defendant need not be interested in obtaining or defending against all the relief demanded. Judgment may be given for one or more of the plaintiffs according to their respective rights to relief, and against one or more defendants according to their respective liabilities.

***

Federal Rule of Civil Procedure 32 – Use of Depositions in Court Proceedings

(a) Use of Depositions. At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition, so far as admissible under the rules of evidence applied as though the witness were then present and testifying, may be used against any party who was present or represented at the taking of the deposition or who had reasonable notice thereof, in accordance with any of the following provisions:

***

(2) The deposition of a party or of anyone who at the time of taking the deposition was an officer, director, or managing agent, or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a public or private corporation, partnership or association or governmental agency which is a party may be used by an adverse party for any purpose.

***

Federal Rule of Evidence 801 – Definitions

The following definitions apply under this article:

***

(d) **Statements Which Are Not Hearsay.** A statement is not hearsay if—

***

(2) **Admission by Party-Opponent.** The statement is offered against a party and is (A) the party's own statement, in either an individual or a representative capacity or (B) a statement of which the party has manifested an adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or (E) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy. The contents of the statement shall be considered but are not alone sufficient to establish the declarant's authority under subdivision (C), the agency or employment relationship and scope thereof under subdivision (D), or the existence of the conspiracy and the participation therein of the declarant and the party against whom the statement is offered under subdivision (E).

Va. Code Ann. § 8.01-420 (2005) – Depositions as Basis for Motion for Summary Judgment or to Strike Evidence

No motion for summary judgment or to strike the evidence shall be sustained when based in whole or in part upon any discovery depositions under Rule 4:5, unless all parties to the suit or action shall agree that such deposition may be so used.

Rules of the Supreme Court of the State of Virgina
Rule 3:18 – Summary Judgment.

Either party may make a motion for summary judgment at any time after the parties are at issue. If it appears from the pleadings, the orders, if any, made at a pretrial conference, the admissions, if any, in the proceedings, or, upon sustaining a motion to strike the evidence, that the moving party is entitled to judgment, the court shall enter judgment in his favor. Summary judgment, interlocutory in nature, may be entered as to the undisputed portion of a contested claim or on the issue of liability alone although there is a genuine issue as to the amount of damages. Summary judgment shall not be entered if any material fact is genuinely in dispute. No motion for summary judgment or to strike the evidence shall be sustained when based in whole or in part upon any discovery depositions under Rule 4:5, unless all parties to the action shall agree that such deposition may be so used.